



An  
Bord  
Pleanála

## Inspector's Report RL08.RL.3516

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### Question

Whether the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development

### Location

Cahirdown Wood Housing Estate,  
Listowel, Co. Kerry

### Declaration

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

n/a

Applicant for Declaration

Kerry County Council

Planning Authority Decision

n/a

### Referral

Referred by

Kerry County Council

Owner/ Occupier

Marie Olive Pierse

Observer(s)

Dermot Godsell

**Date of Site Inspection**

1<sup>st</sup> March 2017

**Inspector**

Mary Crowley

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## 1.0 Site Location and Description

1.1. The appeal site is located along the eastern boundary of the Cahirdown Wood residential estate at the end of two internal estate cul de sacs. The estate is located c 1 mile on the eastern side of Listowel and adjoins the N69. A set of photographs of the site and its environs taken during the course of the site inspection is attached. I would also refer the Board to the photographs available to view throughout the appeal file.

## 2.0 The Question

2.1. A referral case has been received by the Board pursuant to section 5(4) of the Planning and Development Act 2000 whereby Kerry County Council have sought a determination as to *whether or not the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development.*

## 3.0 Planning History

3.1. It appears that there are several planning applications pertaining to the adjoining housing estate. Two of the planning applications for the housing estates may be summarised as follows:

- **Reg Ref 1311A/02** – Kerry County Council granted permission in 2002 for the construction of a service road and associated site development works subject to 23 generally standard conditions (Schedule 2(A) refers). Condition No 1 requires that the development be carried out in accordance with plans and particulars submitted on 2<sup>nd</sup> August 2002 and on the 29<sup>th</sup> May 2002. Condition No 12 requires that the proposed road layout and vehicular access to serve this development shall be located as shown on site layout map received on 2<sup>nd</sup> August 2002. In the same decision Kerry County Council granted permission for the construction of 84 demi detached, 4 detached dwellings and 23 terraced town-houses subject to subject to 11 generally standard conditions (Schedule 2(B) refers). Condition No 24 therein grants permission for the construction of 111 dwellings as shown on site layout received 2<sup>nd</sup> August 2002. Condition No 27 requires that the development

shall be erected on the site as shown outlined in red on site map received on 29<sup>th</sup> May 2002.

- **Reg Ref 3168/06** – Kerry County Council granted permission in 2007 for the construction of the following (a) 6 no. detached, 58 no. semidetached, 5 no. terraced dwellings and (b) 1 no. crèche building, and (c) roads and services and ancillary site works including laying of storm sewer in public roadway and existing green area subject to 42 conditions. Permission has been previously granted for parts of roads and services serving this development under planning reg no. 03/3568

3.2. There were two previous planning applications for access to the field, from the N69 that may be summarised as follows:

- **Reg Ref 08/1033** – Kerry County Council refused permission for the construction of an agricultural entrance at Dromin Upper, Listowel for the following reason:

1. *The proposed development would endanger public safety by reason of a traffic hazard because the site adjoins the National Secondary Route N69. It is considered that traffic movements generated by the proposed development on the N69 would endanger public safety and cause an obstruction to road users. The proposed development would be contrary to Policy 7.2.4 as set out in the Kerry County Development 2003 – 2009. The proposed development would, therefore, be contrary to the proposed planning and sustainable development of the area.*

- **Reg Ref 374/10** – Kerry County Council refused permission for the construction of an access for the purposes of planting, maintaining and harvesting foliage at Dromin Upper, Listowel for the following two reasons:

1. *The proposed development would endanger public safety by reason of a traffic hazard because the site adjoins the National Secondary Route N69 where the maximum speed limit applies. It is considered that traffic movements generated by the proposed development on the N69 would endanger public safety and cause an obstruction to road users due to the movement of the extra traffic*

*generated. The proposed development would, therefore, be contrary to the proper planning and sustainable development.*

2. *The proposed development would create an adverse impact on the national road where the maximum permitted speed limit applies and would be at variance with national policy in relation to control of frontage development on national roads contained in “Development Control Advice and Guidelines(1982)” and “Policy and Planning Framework for Roads (1985)” issued by the department of Environment. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.*

3.3. The following history referral refers to the opening of an agricultural access onto a public road (a cul de sac in a rural area) and may be summarised as follows:

- **RL2774** – This referral related to the opening of an agricultural access onto a public road (a cul de sac in a rural area) in order to facilitate the construction of an agricultural building. The Board decided that the access, the creation of which was development, came within the exempted development provisions of Class 16 of Part 1 of Schedule 2 to the Regulations, and on the facts would not constitute a traffic hazard, and therefore did not conflict with the provisions of article 9 (1)(a)(ii) in relation to traffic safety. It was therefore exempted development.

## 4.0 Policy Context

### 4.1. Development Plan

4.1.1. The operative plan for the area is the **Kerry County Development Plan 2015-2021**. The site is out with the development boundary for Listowel as identified in the **Listowel / Ballybunion Functional Area Local area Plan 2013 – 2019**. However *Listowel Environs Map A Zoning* incorporates a portion of the adjoining residential estate. *Objective R-3 zones these lands as residential to facilitate the completion of the Cahirdown Wood site.*

## 4.2. **Natural Heritage Designations**

- 4.2.1. The site is not located within a designated Natura 2000 site. The relevant European sites are the Moanveanlagh Bog SAC and the Lower River Shannon SAC.

## 5.0 **The Referral**

### 5.1. **Referrer's Case (Kerry County Council)**

- 5.1.1. A Section 5 Declaration is sought from **Kerry County Council** as to whether the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development. Maps and photos attached.
- 5.1.2. Submitted that permission was granted in 2002 to construct 111 no dwelling houses on a site known as Cahirdown Wood. Subsequent to the construction of the works on the 19<sup>th</sup> October 2010 the Council was informed that two entrances had been opened from Cahirdown Wood into the adjoining farmland to the east. Upon investigation it was established that two gates had been erected, one at the bottom of each of the cul de sacs. The works entailed the removal of the ditch and the erection of the gates and gate post.
- 5.1.3. Submitted that Cahirdown Wood is an established occupied housing estate but the houses along the northern boundary have only recently been completed. The roads and services have not been taken in charge by the Local Authority but may be taken in charge in the future. Stated that the roads are 6m wide.
- 5.1.4. The residents are concerns about these entrances. They don't want farm traffic using these roads to access the N69. The view has been expressed that the farmer could easily access the N69 via his farm road that abuts the field on its eastern side. This is the historical means of accessing the field. The access from the field to the farm road is now overgrown.

### 5.2. **Owner / Occupier's Response**

- 5.2.1. The response from the owner **Maire Olive Pierse & Eilin Enright** has been prepared and submitted by Pierse Fitzgibbon Solicitors. The owner sets out the detailed ownership and planning history relating to the housing estate and the

agricultural field all of which have been noted and is available to view on the file. The issues relevant to this referral may be summarised as follows:

- 5.2.2. In 2007 Jerry Fitzmaurice became the registered owner of the Cahirdown Wood field and as of December 2016 is still the registered owner. It is stated that not only did he not object to the gates, but cooperated in every way and when an obstruction was caused by a person unknown, he had it removed.
- 5.2.3. In 2008 and 2009 the owner applied for an entrance to the field off the N69 and slightly east of where the County Council had previously granted permission for an entrance. Both applications were refused. As a result of these refusals and to protect her rights the owner arranged for two gates to be erected in order to connect her farm field to the rights of way that have been reserved in 1973 Deed of Transfer and acknowledged in 2007 as being an access to this field.
- 5.2.4. In January 2012 the County Council wrote to Mrs Pierse making a complaint about these gates stating that it believed the gates required planning permission. The County Council then served an Enforcement Notice. The owner response (copy attached) included a copy of the 1988 Deed and map with covenants (a) to (e) and the assent together with legal arguments regarding the owners position in law. The owners Senior Counsel advised that the gates:
- Do not amount to development as such but that if they do amount to development then:
  - It was for the purposes of agricultural use, and therefore it was except development
- 5.2.5. Noted that the letter issued by Kerry County Council says that the residents (unspecified) do not want farm traffic using “their” road to access the N69. Submitted that the road belongs to the developer, who has always been aware of the rights and covenants in the various legal documents. Indeed, all the “residents” were aware of them when they bought their properties as these are registered on the title since the sale and specifically acknowledged since then (i.e. in 1998 and 2007). Submitted that the gate and access could not be put in until the roads were built.
- 5.2.6. Gate A – The Council mentioned that the gates are “unlocked”. A chain and lock can be seen (photos attached). Residents to whom the owner have spoken has said that

they have no objection to it being there and that they were aware that it was there for access to the farm.

5.2.7. Gate B – The County Council alleged that these gates have not been used. This is clearly not so. On the 7<sup>th</sup> May 2012 because of the bad weather, one of the gates was used to gain access to this field to spread fertilizer. In July 2016, a gate was used again to put in stones to prevent water from coming from the field onto the road way at the request of local residents in the estate due to flooding.

5.2.8. The residents complaint is that the gates will allow the creation of a nuisance by farm traffic. This is strenuously denied. Submitted that this is not a planning matter. Access is required because in bad weather access to the field cannot be got from the rest of the farm. Submitted that putting a farm gate in one's own fence to one's own right of way is not development, or if it is exempt agricultural development.

### 5.3. Further Responses

5.3.1. **Dermot Godsell**, 10 The Grove, Cahirdown Wood, Listowel and complainant to Kerry County Council submitted the following to An Bord Pleanála as summarised:

- Complainant purchased No 10 The Grove in 2006. In around 2010 the two entrances were made by removing an existing boundary ditch on the estate and erected two gates at the end to two cul de sacs. Complainant queried at the time if planning permission had been granted and requested that they be removed. Stated that no such gates existed at the time the property was purchased.
- In May 2012 Kerry County Council advised that an Enforcement Notice was issued. However, the gates have remained in place and the matter has now been referred to An Bord Pleanála.
- Submitted that they were erected without planning permission and that the gates are an eyesore and do not fit in the overall development or safety of the estate.

5.3.2. Further comments in correspondence from Pierse Fitzgibbon Solicitors (date stamp 7<sup>th</sup> February 2017) on behalf of the owner **Maire Olive Pierse & Eilin Enright** may be summarised as follows:



- When Dermot Godsell bought his house in 2006 presumably his solicitor examined the title. If so, he would have seen the rights of way and other rights and easements registered in favour of the owner / occupier (Marie Olive / Eilin Enright).
- Referring to previous correspondence it is queried what other entrances to the property could be used. As pointed out already permission was refused twice for an entrance on to the N69
- The gates are green in order to match in style and colour the fencing in the estate and the rural location of the estate.

5.3.3. Further correspondence from **Dermot Godsell** (date stamp 8th February 2017) may be summarised as follows:

- Noted that the owner states that there was direct access to the farm from N69; an opening that is still there and which does not have a gate. Queried why no farm gate was put at this location.
- Notwithstanding changes in ownership it is the responsibility of Kerry County Council with regard to any issues concerning the erection of these gates.
- Due to the refusal by Kerry County Council for an entrance onto the N69 the commercial / farm gates were erected at the end of the cul de sac on to a private residential estate without planning permission. At this section of the estate, the houses are open plan to the front with no wall or gates. Any farm traffic (cattle, machinery etc) in this area would be a major traffic hazard and safety concern.
- As set out by Kerry County Council “the legal entitlement referred to in the deed does not however, give a legal entitlement to cut the boundary hedgerow and erect gate post and wire fencing at this opening onto the end of the cul de sac in the adjacent Cahirdown Wood housing estate.
- From the information provided there are no rights of way marked on maps showing a line of sewers.
- Dermot Godsell had no involvement with the planting or removing of any trees at any time at these gates.
- The erection of these gates is not exempt, are a traffic hazard, unacceptable, unreasonable and most of all unsafe.

5.3.4. Further correspondence from **Kerry County Council** (date stamp 15<sup>th</sup> February 2017) may be summarised as follows:

- The forming of the entrances amounts to development for the purposes of facilitating the use of land for agriculture, rather than constituting “a use for agricultural purposes”.
- Reference is made to *Irish Wildbird Conservancy and The Commissioners for the Office of Public works vs Clonakilty Golf & Country Club Limited & Ors*. It appears to Kerry County Council that the forming of openings onto the agricultural lands in question by the developer amounts to the carrying out of work on the lands and, if that position is correct, those cannot then be considered as being the making of a material change in the use of the lands. It therefore appears to follow that the opening of the entrances on the lands by the developer is work on the lands and not a use of the lands as envisaged by Section 4(1)(a) exemption.
- Reference is also made to *Cummingham vs An Bord Pleanála & Sligo County Council*. The conclusions reached by Justice Hogan are of considerable relevance in this case and that the forming of the two entrances by the developer constitutes development rather than a use per se of the developers lands for agricultural purposes. Concern is also raised that the use of these roads by agricultural vehicles would give rise to traffic safety issues.
- Planning permission was granted based on the layout received on the 2<sup>nd</sup> December 2003. This corresponds to Map 6 submitted by the landowner in their submission to the Board. This map clearly shows that the gardens of the two end houses extends across the ends of the two cul de sacs, thus preventing access to the field behind. The layout was further confirmed in the “Scheme Map Approved for Registration Purposes” received by the Council on 21<sup>st</sup> February 2007. It would appear that the developer of the housing estate was totally unaware of the existence of any right of way.
- The housing estate development was clearly granted on the basis that there would be no access to the field behind.

5.3.5. Further additional comments in correspondence from Piers Fitzgibbon Solicitors (date stamp 3<sup>rd</sup> March 2017) on behalf of the owner **Maire Olive Piers & Eilin Enright** may be summarised as follows:

- Objection to the manner in which the County Council dealt (or failed to deal properly) with this matter and the owners legal and constitutional rights. County Council were given proper and extensive legal submission on the law regarding putting farm gates in a farm fence as being exempt development, if it is development at all which is denied. The County Council never replied. Further the owner has not been given access to their file.
- The County Council failed to take legal advice or given proper legal replies to the owner's submissions. The matter was abandoned by the Council and is now apparently resurrected by Dermot Godsell who bought a house in the estate in the boom years.
- Dermot Godsell is not a party to this "appeal". Queried if this is an appeal and if so what decision is being appealed and by whom and against whom.
- The rights reserved to the owner to access the farm had to await the site development which is not complete as yet.
- The alternative entrance referred to in submission *is still unused and gives no access to the farm.*
- No evidence provided that that these gates are a traffic hazard or give rise to any safety breaches.
- The opening of a farming access is an exercise of the owners legal and constitutional rights. These rights have been reserved in a number of documents. There is a specific agricultural exemption, should the gates be considered development.
- Copies of letter to Pierson Fitzgibbon Solicitors (dated 31<sup>st</sup> August 2015) from "concerned Local Residents Cahirdown Wood Estate" and letter from Pat Rogers supporting the entrances attached.

5.3.6. Further correspondence from **Dermot Godsell** (date stamp 2<sup>nd</sup> March 2017) may be summarised as follows:

- Almost all previous issues raised have been ignored in correspondence from the landowner.
- Size of the houses in the estate has no bearing on the erection of the gates.
- It is incorrect that Dermot Godsell is the only person concerned about these gates.

- Any meeting with an Inspector of An Bord Pleanála would be inappropriate.
- Objects to the erection of the farm gates.

5.3.7. Further correspondence from **Kerry County Council** (email date 6<sup>th</sup> March 2017 2017 and date stamp 7<sup>th</sup> March 2017) may be summarised as follows:

- Copy of maps, decision and the planners report in relation to PRN 08/1033 and PRN 10/374 provides. Relate to previous refusals for entrances to the field and referred to in submissions. See section 3.0 above.
- Submitted that there is a good quality farm road running along the eastern side to the field in question and that the land owner has the option to open gates onto it if required. Gates at this side of the field would not give rise to the issue of traffic hazard which is the stated reason for Kerry County Council objecting and pursuing the gates on the western side. Further they would not give rise to any conflicts arising from the residential uses of the lands to the west and the agricultural use of lands to the east.

## 6.0 Statutory Provisions

### 6.1. Planning and Development Act, 2000

**Section 2(1)** of the Act defines “works” as

*“Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...”*

**Section 3(1)** of the Act defines “development” as follows:

*“In this Act, “development” means, except where the context otherwise requires, the carrying out any works on, in, over or under land or the making of any material change in the use of any structures or other land.”*

**Section 4(1)(a)** of the Act states that the following shall be exempted for the purposes of this Act:

*(a) development consisting of the use of any land for the purpose of agriculture*

*and development consisting of the use for that purpose of any building occupied together with land so used;*

**'Public Road'** is defined in Section 2 as having *the same meaning as the Roads Act, 1993.*

### **Roads Act, 1993**

Section 2 (l) defined public road as '*a means over which a public right of way exists and the responsibility for the maintenance of which lies on a roads authority*'.

## **6.2. Planning and Development Regulations, 2001**

**Article 6(1)** of the Planning and Development Regulations 2001, states:

*"Subject to Article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted for the purposes of the Act provided that such development complies with the conditions and limitations specified in Column 2 of the said Part 1 opposite the mention of that class in the said Column 1."*

### **Schedule 2, Part 1 – (Exempted Development General) Class 16**

*"The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out."*

The conditions and limitations associated with Class 16 are as follows:

*"Such structures, works, plant or machinery shall be removed at the expiration of the period and the land shall be reinstated same to such extent as may be authorised or required by a permission under the Act."*

**Article 9(1)** states that Development to which Article 6 relates shall not be exempted development for the purposes of the Act –

(a) If the carrying out of such development would – inter alia

*(i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act,*

*(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surface carriageway of which exceeds 4 metres in width,*

*(iii) endanger public safety by reason of a traffic hazard or obstruction of road users,*

*(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*

*(xi) obstruct any public right of way*

## **7.0 Assessment**

7.1. Section 5 of the Planning and Development Act (as amended) provides a mechanism by which questions as to whether something is or is not development and/or is or is not exempted development can be asked. The default position per Section 32 of the Planning and Development Act is that there is a general obligation to obtain permission for development that is not exempted development. The Act defines “development”, and, along with the Regulations set out provisions for exempted development. If a development is not among these provisions, then it is not exempted development. Essentially there are three key steps, set out below, in determining whether the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development. Before addressing these three question and in the interest of clarity I have set out the main parties involved together with summary of the background and context of the referral.

7.2. The main parties in this referral are as follows:

- Kerry County Council (Referrer)
- Marie Olive Pierse & Eilin Enright(Landowner)
- Dermot Godsell (Complainant to Kerry County Council)
- Jerry Fitzmaurice (Owner of Cahirdown Wood)

7.3. Kerry County Council has sought declaration from An Bord Pleanála in respect of whether the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development. Many of the matters raised in correspondence to this referral such as inter alia the site history, existence of an alternative access to the field along the eastern side of the field etc, do not in my view concern the specific question that is before the Board.

7.4. The two entrances in question are at the end of the two cul de sacs located within a private residential estate which have not been taken in charge by the County Council. The estate is otherwise known as Cahirdown Wood Estate and adjoins the owners agricultural lands. The owner (originally Marie Olive Pierse and now her daughter Eilin Enright) has responded to the grounds of the referral. It is noted that Marie Olive Pierse was the original owner of the land which is now the Cahirdown Wood housing estate and when the property was sold in 1973 she reserved the right to use roadways, sewers, watermains, etc as she was the owner of the adjoining field. At a later date she arranged for two gates to connect her farm field to the right of way. It is stated that the two entrance gates into the farms were erected solely for the purposes of agriculture and the owner has a legal right and entitlement to have acted so. It is submitted that the two gates remain locked and are used only for agricultural purposes and occasional entry and exit to the fields in question which otherwise suffer from extensive waterlogging at certain periods of the year.

#### 7.5. **Is something Development?**

7.5.1. The first question before the Board relates to whether or not the works carried out constitute development in accordance with the provisions of the 2000 Act. 'Works' as defined in the Act include any act or operation including construction and alterations. In this regard the construction of two new entrances to a field at the end of two cul de sacs which involves the removal of part of the field boundary would constitute works in accordance with the definitions set out in Article 2 of the Act. The proposal therefore constitutes development in accordance with the provisions of the Act.

## 7.6. If Development, is it Exempted?

- 7.6.1. The owners state that the forming of two entrances constitutes exempted development by virtue of the provision of Section 4(1)(a) of the Planning and Development Act 2000 (as amended) which provides that *development consisting of the use of any land for the purposes of agriculture consisting of the use for that purpose of any building occupied together with land so used* is exempted development. However, I agree with Kerry County Council that the two entrances in question amount to development for the purposes of facilitating the use of lands for agriculture, rather than constituting “a use for agricultural purposes”. Therefore, the two entrances are not covered by reference to Section 4(1)(a) of the Planning and Development Act 2000 (as amended).
- 7.6.2. Further to Schedule 2, Part 1 (Exempted Development General) Class 16 the two entrances are not *needed temporarily in connection with that development during the period in which it is being carried out*. Therefore, the two entrances are not covered by reference to Class 16 of Schedule 2 Part 1 of Article 6 of the 2001 Regulations

## 7.7. If Exempted Development, are there any restrictions to this exemption?

- 7.7.1. A further question arises as to whether or not if any of the provisions as set out in Article 9(1) of the Planning and Development Regulations 2001 (as amended) apply in this instance. Article 9 de-exempts various development that would otherwise be exempted development under Article 6. Sections relevant to this referral area discussed below.
- 7.7.2. **Article 9(1)(i)** de-exempts development where it would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- 7.7.3. Kerry County Council in their submission to the Board state that planning permission was granted for the Cahirdown Estate based on the layout received on the 2nd December 2003 and that this corresponds to Map 6 submitted by the landowner in their submission to the Board. Stated that this map clearly shows that the gardens of the two end houses (Houses No 1 and 66 on Map No 6) extends across the ends of the two cul de sacs, thus preventing access to the field behind. It is further stated that the layout was further confirmed in the “Scheme Map Approved for Registration



Purposes” received by the Council on 21st February 2007. Having regard to the foregoing and notwithstanding any “rights of way” registered on the title it would appear that the housing estate development was granted on the basis that there would be no access to the adjoining field.

- 7.7.4. While it would be reasonable to conclude based on the information on the referral file to conclude that the provision of Article 9(1)(i) would apply in this instance I am reluctant to definitely say if this is case without first considering the relevant planning history and associated plans and particulars. This information is not available on the referral file. Therefore, it is recommended that should the Board agree that the two entrances to a field at the end of two cul de sacs may indeed contravene a previous grant of permission as stated by Kerry County Council that the relevant planning history be sought for consideration prior to the determination of this referral.
- 7.7.5. **Article 9(1)(ii)** de-exempts development where it would result in the creation / widening of access to public road of more than 4 metres in width. It is acknowledged by the planning authority that these cul de sacs have not been taken in charge by Kerry County Council and accordingly does not constitute a public road as defined in the Planning and Development Act, 2000 and the Roads Act, 1993. The development does not therefore come within the scope of Article 9 (1) (a) (ii).
- 7.7.6. **Article 9(1)(iii)** de-exempts development where it would endanger public safety by reason of a traffic hazard or obstruction of road users. The access in question is located at the end of two cul-de-sacs within a private residential estate. As noted on day of site inspection the houses on approach to both entrances are open plan to the front with no wall or gates. I consider that the traffic movements generated by the proposed entrances would be a safety concern by reason of a traffic hazard and cause an obstruction to road users due to the nature of the extra traffic generated. Having inspected the site, I consider that the entrances in question constitute a traffic hazard and as such the restriction of an exemption set out in Article 9(1)(a)(iii) would apply.
- 7.7.7. **Article 9(1)(viiB)** de-exempts development where the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site. Having regard to the nature and scale of the development, the nature of the receiving environment and proximity to the nearest

European site (Moanveanlagh Bog SAC and the Lower River Shannon SAC), no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect individually or in combination with other plans or projects on a European site. It would therefore be reasonable to conclude that the provision of Article 9(1)(viiB) would not therefore apply in this instance.

- 7.7.8. **Article 9(1)(xi)** de-exempts development that would obstruct any public right of way. While acknowledging the rights of way and other rights and easements registered in favour of the owner / occupier (Marie Olive / Eilin Enright) it would appear that there is no public right of way evident at this location. Based on the information contained on file it is my view that the proposed entrances would not impact on any public right of way. It would therefore be reasonable to conclude that the provision of Article 9(1)(xi) would not therefore apply in this instance.

## 8.0 Recommendation

- 8.1. Arising from my assessment above I consider that the access in question constitutes development that is not exempted development having regard to the restrictions set out in Article 9(1)(a) subsection (iii) of the Planning and Development regulations, 2001, as amended.
- 8.2. I recommend that the Board should decide this referral in accordance with the following draft order.

**WHEREAS** a question has arisen as to whether the forming of two entrances to a field at the end of two cul de sacs is or is not development or is or is not exempted development

**AND WHEREAS** Kerry County Council requested a declaration on this question from An Bord Pleanála on the 22<sup>nd</sup> Day of November 2016:

**AND WHEREAS** An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(a) of the Planning and Development Act, 2000, as amended,
- (d) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (e) Class 16 of Schedule 2, Parts 1 of the Planning and Development Regulations, 2001, as amended
- (f) the planning history of the site,
- (g) the pattern of development in the area

**AND WHEREAS** An Bord Pleanála has concluded the forming of two entrances to a field at the end of two cul de sacs is development and is not exempted development as it would:

(iii) endanger public safety by reason of a traffic hazard or obstruction of road users

**NOW THEREFORE** An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (b) of the 2000 Act, hereby decides that the works constitute development and is not exempted development.

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**Mary Crowley**

**Senior Planning Inspector**

**20<sup>th</sup> March 2017**